

No. 14566

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**United States  
Court of Appeals**  
for the Ninth Circuit

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ELMER W. BROWN,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, ALASKA  
AGGREGATE CORPORATION and MOR-  
RELL P. TOTTEN & COMPANY, INC.,

Appellees.

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**Transcript of Record**

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**Appeal from the District Court  
for the District of Alaska,  
Division Number One.**

**FILED**

**JAN 26 1955**

**PAUL P. O'BRIEN,**

**CLERK**



No. 14566

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

JOHN H. DIMOND,  
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Juneau, Alaska,  
For Appellant.

FAULKNER, BANFIELD & BOOCHEVER, by  
R. BOOCHEVER,  
P.O. Box 1121,  
Juneau, Alaska,  
For Appellee, Alaska Aggregate Corp., et al.

J. GERALD WILLIAMS,  
Attorney General,  
Juneau, Alaska,  
For Appellee, Alaska Industrial  
Board.





In the District Court for the District of Alaska,  
Division Number One, at Juneau

Civil Action No. 6981-A

ELMER W. BROWN,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA  
AGGREGATE CORPORATION, and MOR-  
RELL P. TOTTON & CO., INC.,

Defendants.

### STIPULATION OF FACTS

Be it remembered that the following agreed statement of record on appeal in the above-entitled cause was filed in the office of the Clerk of the District Court for the District of Alaska, First Division, at Juneau, Alaska, on the 20th day of October, 1954.

#### Agreed Statement

The relevant facts in this case are these:

1. Plaintiff was employed by defendant, Alaska Aggregate Corporation, at the Colorado Coal Mine, near Anchorage, Alaska, on August 29, 1952, as foreman in charge of heavy equipment and labor. In such employment he worked twelve hours per day, seven days per week, and his wage was at the rate of \$3.65 per hour—giving him an average weekly “take-home” pay of \$319.00. On or about September 15, 1952, he suffered an accidental in-

jury to his left knee in the course of such employment, and after laying off work for about two days he continued such employment until November 24, 1952, when he went to Seattle, Washington. On December 16, 1952, he underwent a cartilage operation on his left knee and resumed other employment on February 16, 1953.

2. In respect to such injury, the defendant, Alaska Aggregate Corporation, paid plaintiff, under the provisions of the Alaska Workmen's Compensation Act, the following:

a. All medical expenses.

b. Temporary disability compensation in the sum of \$691.98 for the period December 17, 1952, to February 15, 1953, which was based on an "average daily wage earning capacity," within the meaning of the "Temporary Disability" section of the Alaska Workmen's Compensation Act, of \$17.20.

c. Partial permanent disability compensation in the sum of \$708.75, representing a 17½% loss of use of the injured leg.

3. Plaintiff was a resident of the State of Washington and customarily resided there, and not in Alaska. His usual occupation was that of a "cat skinner," and during the period of his disability, i.e., November 24, 1952, to February 16, 1953, the "going" rate for cat skimmers in Washington was \$120.40 per week, or \$17.20 per day.

4. Plaintiff's employment record for 1951 and 1952 was as follows:

a. During the year 1951 plaintiff earned a total of \$6,126.48. Of this amount, \$993.00 was earned in employment with the L. G. Wingard Packing Company in Alaska; the balance was earned in the State of Washington. With respect to the latter amount (\$5,133.48), no showing was made as to which portion, if any, was earned during the period November 24, 1951, to January 1, 1952.

b. In 1952, the names of his employers, the dates of employment and the amounts earned were as follows:

Employer and Period of Employment:

Builders Equipment, Rental, Edmonds, Wash.; all of January and part of February 1952.

Amounts earned (40-hour week) . \$ 1,215.79

Employer and Period of Employment:

Campbell-Atherton Co., Arlington, Wash.; March 1-May 15, 1952.

Amounts earned (40-hour week) . 1,306.08

Employer and Period of Employment:

Morrison-Knudsen Co., Anchorage, Alaska; May 15-June 19, 1952.

Amounts earned (40-hour week) . 918.00

Employer and Period of Employment:

Wingard Packing Co., Ugashik, Alaska; June 19-Aug. 1, 1952.

Amounts earned . . . . . 2,353.10

## Employer and Period of Employment:

Wm. J. Halleran, Seattle Washington; 10 days in Aug., 1952.

Amounts earned ..... 124.70

## Employer and Period of Employment:

Patti-McDonald Const. Co., Anchorage, Alaska; 10 days in Aug., 1952.

Amounts earned ..... 186.55

## Employer and Period of Employment:

Alaska Aggregate Corp., Anchorage, Alaska; Sept. 1-Nov. 24, 1952.

Amounts earned (84-hour week). 3,901.59

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Total .....\$10,005.81

5. Defendants' computation of the amount of temporary disability compensation paid (\$691.98) was grounded upon their view that plaintiff's "average daily wage earning capacity," within the meaning of the "Temporary Disability" section of Section 43-3-1 ACLA, was \$17.20—this being the amount that plaintiff would have earned daily in the State of Washington had he been employed there as a cat skinner during the period of his disability, i.e., November 24, 1952, to February 16, 1953. Plaintiff was not satisfied with this, his thought being that he ought to have received compensation based upon a higher average wage earning capacity, as computed, for example, by the total wages earned by him during 1952, the year of his injury; and hence, he filed with the Alaska Industrial Board on November 12, 1953, his application

for adjustment of claim. The matter was heard before the full Board of three members on December 17, 1953, and the Board, with one member dissenting, on January 8, 1954, awarded plaintiff compensation for temporary total disability for the period November 24, 1952, to February 16, 1953, on the basis of an average wage earning capacity of \$13.07 per day. Defendants have waived any right to reimbursement for the amount paid by them in excess of the sum of \$13.07 per day.

6. From this decision of the Alaska Industrial Board plaintiff appealed to the District Court on January 27, 1954, under the provisions of Section 43-3-22 ACLA 1949; and on July 19, 1954, that Court, without opinion, made and entered its findings of fact, conclusions of law and decree affirming the decision and award of the Alaska Industrial Board. Plaintiff filed his notice of appeal from such decree to the United States Court of Appeals for the Ninth Circuit on August 10, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants-Appellees, Alaska Aggre-  
gate Corp. and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General of Alaska;

By /s/ ELMORE A. MERDES,  
Assistant Attorney General, Attorney for Defendant-Appellee,, Alaska Industrial Board.

Approved: Oct. 23, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed October 20, 1954.

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Alaska Industrial Board  
Juneau, Alaska  
Case No. 2-10-19  
Docket No. 249

ELMER W. BROWN,  
Applicant,  
vs.

ALASKA AGGREGATE CORPORATION and  
MORRELL P. TOTTON & CO.,  
Defendants.

### AWARD

This matter came on for hearing before the Full Board on December 17, 1953, pursuant to the application of Elmer W. Brown. Applicant was represented by Attorney William L. Paul, Jr., and defendant was represented by Attorney Robert Boo-



chever of counsel Faulkner, Banfield and Boochever. The Board heard argument of counsel and considered the case on the merits, and made these

### Findings of Fact

Applicant is a 42-year-old married man with one dependent minor child. While employed by Alaska Aggregate Corporation as a foreman on September 15, 1952, at the Colorado Coal Mine he was struck by a steel girder on his left knee, resulting in a mild tear of the semi-lunar cartilage. He was treated by Dr. Harold Sogn of Anchorage, Alaska, and by Dr. Ernest Burgess and Hoe Brugman of Seattle, Washington, and underwent surgery on December 16, 1952.

The files in this case show applicant earned \$6,126.48 during the year 1951 and earned \$10,005.81 during the year 1952, as evidenced by copies of his Internal Revenue filings.

### Award

Applicant is awarded compensation for temporary total disability for the period November 24, 1952, to February 16, 1953. Applicant's earning capacity is hereby determined to be \$13.07 per day.

January 8, 1954.

[Seal]      /s/ NEIL F. MOORE,  
Member;

/s/ J. GERALD WILLIAMS,  
Member.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter, coming on to be heard before the court on the complaint and appeal filed by the plaintiff, and the plaintiff having been represented by W. L. Paul, Jr., and the defendants, Alaska Aggregate Corp. and Morrell P. Totten & Company, Inc., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, and attorneys for the plaintiff and defendants having entered into a stipulation to submit the matter for determination by the court upon briefs, and the court having reviewed the documentary evidence presented to the Alaska Industrial Board and briefs having been submitted, the court makes the following

### Findings of Fact

1. On or about September 15, 1952, Elmer W. Brown alleges that he twisted his knee while working for the defendant, Alaska Aggregate Corp.
2. Said employee continued with his work until his job with the defendant, Alaska Aggregate Corporation, terminated on November 24, 1952.
3. While employed by the Alaska Aggregate Corp. employee received average weekly wages of \$319.00.



4. On December 16, 1952, employee underwent an operation on his knee, resuming employment on February 16, 1953.

5. The defendant employer and defendant insurance company paid the employee \$708.75, representing 17½% loss of use of the leg involved, and also paid temporary disability in the additional amount of \$681.98 based on an average daily wage of \$17.20. In addition, the employer paid all medical expenses involved.

6. Employee was a resident of the State of Washington and customarily resided there when not employed in Alaska.

7. During the period employee was disabled, the going rate for cat skimmers, employee's usual occupation, in the State of Washington was \$120.40 per week or \$17.20 per day.

8. Employee's wages during the year 1951 totalled \$6,126.48 and during the year 1952, \$10,005.81.

9. Applicant's proof of his earnings during the period of the preceding year corresponding to the period he claimed to be disabled as a result of the alleged injury of September 15, 1952, revealed earnings from November 1, 1951, to May 15, 1952, in the amount of \$2,521.78.

10. Applicant's average daily wage earning capacity during the period November 1, 1951, to May 5, 1952, was \$12.93 per day.

11. The Alaska Industrial Board entered its decision and award on January 8, 1954, allowing applicant compensation for the period November 24, 1952, to February 16, 1953, based on an average daily wage of \$13.07 per day.

From the foregoing Findings of Fact, the court makes the following

### Conclusions of Law

1. There was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining employee's average daily wage during the period of his disability to be \$13.07 per day.

2. The decision of the Alaska Industrial Board should be affirmed and defendants should have judgment against the plaintiff for their costs and disbursements, including a reasonable attorney's fee of \$.....

Done in Open Court this 19th day of July, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed in open Court July 19, 1954.

In the District Court for the District of Alaska,  
Division Number One, at Juneau

Civil Action File No. 6981-A

ELMER W. BROWN,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD and ALASKA  
AGGREGATE CORP. and MORRELL P.  
TOTTEN & COMPANY, INC.,

Defendants.

### DECREE

This Matter, having come on to be heard before the court on the complaint and appeal filed by the plaintiff, the plaintiff having been represented by W. L. Paul, Jr., and the defendants, Alaska Aggregate Corp., and Morrell P. Totten & Company, Inc., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, the attorneys for plaintiff and defendants having entered into a stipulation to submit the matter for determination by the court upon briefs, the court having reviewed the documentary evidence presented to the Alaska Industrial Board and briefs having been submitted, and the court having entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Alaska Industrial Board, dated January 8, 1954, be and the same is hereby

affirmed, and defendants are awarded judgment against the plaintiff for their costs and disbursements, including an attorney's fee of \$. . . . .

Done in Open Court this 19th day of July, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed in open court July 19, 1954.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 19th day of July, 1954.

Dated August 10, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

[Endorsed]: Filed August 12, 1954.

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[Title of District Court and Cause.]

### BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, Elmer W. Brown, as principal, and Indemnity Insurance Company of North America, a corporation, as

surety, are held and firmly bound unto Alaska Industrial Board and Alaska Aggregate Corp., and Morrell P. Totten and Company, Inc., as defendants, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Alaska Industrial Board and Alaska Aggregate Corp. and Morrell P. Totten and Company, Inc., its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, 1954.

Whereas, on July 19, 1954, in an action pending in the District Court of the United States for the Territory of Alaska, 1st Division, between Elmer W. Brown, as plaintiff, and Alaska Industrial Board and Alaska Aggregate Corp. and Morrell P. Totten and Company, Inc., defendants, an order granting a motion to dismiss was entered against the said Elmer W. Brown, and the said Elmer W. Brown having filed in said Court a notice of appeal from such order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said Elmer W. Brown shall prosecute his appeal to effect, and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Elmer W. Brown, if the judgment is modified

or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

ELMER W. BROWN,

By /s/ JOHN H. DIMOND,  
Of His Attorney,  
Principal.

[Seal] INDEMNITY INSURANCE COMPANY  
OF NORTH AMERICA,

By /s/ HENRY R. BUCK,  
Attorney-in-Fact,  
Surety.

[Endorsed]: Filed August 26, 1954.

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[Title of District Court and Cause.]

### STIPULATION

Whereas, notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above cause was filed herein on August 12, 1954, and the time for filing the record on appeal and docketing the appeal will, without extension by order of this court, expire on September 21, 1954;

Now, Therefore, it is stipulated between the attorneys for the respective parties herein that plaintiff be given up to and including November 1, 1954, to file the record on appeal and docket the same in the United States Court of Appeals for the Ninth

Circuit, and that an order to that effect be entered herein.

Dated at Juneau, Alaska, this 11th day of September, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants, Alaska Aggregate Corp.,  
and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General of Alaska.

By /s/ J. GERALD WILLIAMS,  
Attorney for Defendant,  
Alaska Industrial Board.

[Endorsed]: Filed in open Court September 20,  
1954.

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[Title of District Court and Cause.]

### ORDER

Upon consideration of the stipulation, dated September 11, 1954, between the attorneys for the respective parties to this action, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of



Appeals for the Ninth Circuit in the above cause is extended to and including November 1, 1954.

Dated at Juneau, Alaska, this 20th day of September, 1954.

/s/ GEORGE W. FOLTA,  
District Judge.

[Endorsed]: Filed September 20, 1954.

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[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED  
UPON BY PLAINTIFF

Plaintiff proposes on his appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$13.07 per day.

This was error because the evidence clearly showed that plaintiff's "average daily wage earning capacity," within the meaning of the "temporary disability" clause of Section 43-3-1 ACLA 1949, was greater than \$13.07 per day.

2. The court erred in entering its decree in favor of the defendants and in affirming the decision and award of January 8, 1954, of the Alaska Industrial



Board, and in giving judgment to defendants against plaintiff for the former's costs and attorneys' fees.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1954.

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[Title of District Court and Cause.]

#### STIPULATION RE PRINTING OF RECORD

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that in printing the record to be used in the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of such titles on all papers used as part of such record the words: "title of district court and cause"; and that all endorsements on all papers used as part of such record may be omitted except the clerk's filing marks and admissions of service.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,

Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten &amp; Co., Inc.

J. GERALD WILLIAMS,

Attorney General for Alaska;

By /s/ EDWARD A. MERDES,

Attorney for Defendant-Appellee, Alaska Industrial Board.

[Endorsed]: Filed October 20, 1954.

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[Title of District Court and Cause.]STIPULATION AS TO CONTENTS OF  
RECORD ON APPEAL

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that the transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above cause, shall comprise the following and only the following:

1. The Alaska Industrial Board's award of January 8, 1954.
2. Findings of fact and conclusions of law.
3. Decree.
4. Notice of appeal and cost bond on appeal.

5. Statement of points relied upon by appellant.
6. Stipulation re printing of record.
7. Stipulation and order re extension of time for filing record on appeal.
8. Agreed statement as record on appeal.
9. This stipulation.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Plaintiff-  
Appellant.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,  
Attorneys for Defendants-Appellees, Alaska Aggre-  
gate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,  
Attorney General for Alaska;

By /s/ EDWARD A. MERDES,  
Attorney for Defendant-Appellee, Alaska Industrial  
Board.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 27th day of October, 1954.

[Seal]

J. W. LEIVERS,

Clerk of the District Court,

By /s/ P. D. E. McIVER,

Chief Deputy.

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[Endorsed]: No. 14566. United States Court of Appeals for the Ninth Circuit. Elmer W. Brown, Appellant, vs. Alaska Industrial Board, Alaska Aggregate Corporation and Morrell P. Totten & Company, Inc., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 28, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 14566

ELMER W. BROWN,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA  
AGGREGATE CORP., and MORRELL P.  
TOTTEN & CO., INC.,

Appellees.

APPELLANT'S STATEMENT OF POINTS  
AND DESIGNATION OF PARTS OF REC-  
ORD TO BE PRINTED

Appellant above named adopts the "statement of points to be relied upon by plaintiff," filed with the Clerk of the District Court, as his statement of points to be relied upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record as filed and certified be printed.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,  
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1954.

